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The Return to Returnables: New York Enacts a Bottle Bill

I. Introduction

In September, 1983, New York became the ninth state to implement bottle bill legislation.¹ New York's new law encourages consumers to return beer and soft drink containers by requiring a mandatory five cent deposit.² Since 1971, when Oregon enacted the first bottle bill,³ many states have weighed the conflicting evidence presented by environmentalists⁴ and the bottle industry⁵ in deciding whether to join this "return to returnables." The container and beverage industries remain the most formidable opponents to further bottle bill legislation,⁶ although support for national legislation is emerging despite industry efforts.⁷ To date, almost twenty percent of the states have enacted bottle bills, despite intense industry lobbying. Thus far, the bills have withstood constitutional challenges brought by industry opponents.⁸

Part II of this Comment will discuss the growth of the disposable container industry after World War II, and the provisions of state bottle bills enacted in response to this expansion. Part III presents industry arguments against bottle bills and the effect industry efforts have had on state legislation. Part IV re-

1. The New York State Returnable Container Act, N.Y. ENVTL. CONSERV. LAW §§ 27-1001 to -1019 (McKinney Supp. 1982), provides that a retailer must accept returned beverage containers for carbonated soft drinks, mineral and soda water, beer, and other malt beverages, and must pay the consumer the statutory refund value of each container.

2. *Id.* at § 27-1005.

3. OR. REV. STAT. §§ 459.810-.995 (Supp. 1981) (originally passed in 1971, effective Oct. 1, 1972).

4. See, e.g., E. LOWRY, T. FENNER & R. LOWRY, *DISPOSING OF NON-RETURNABLES: A GUIDE TO MINIMUM DEPOSIT LEGISLATION* (Jan. 1975) (published by the Stanford Environmental Law Society) [hereinafter cited as *DISPOSING OF NON-RETURNABLES*]; see also *infra* notes 13-17, 77-87 and accompanying text.

5. See *infra* notes 49-53 and accompanying text.

6. See *infra* notes 49-74 and accompanying text.

7. See *infra* notes 128-35 and accompanying text.

8. See *infra* note 20 for a discussion of the constitutional challenges.

views New York's experience in passing its bottle bill. Part V explains the mechanics of the recycling system embodied in a bottle bill. Finally, Part VI discusses the future for bottle bill legislation.

II. Non-returnables: Problems and State Solutions

A. *Market Expansion in the Container Industry*

The dramatic increase in the number of throwaway containers in the early 1950's was a result of the metal and container industries' thirst for new markets after World War II. Before the War, and through the 1950's, most bottles and cans were returnable.⁹ After the War, the steel and aluminum industries perceived the throwaway container as a tremendous new growth area to replace military production for their underutilized operations. At that time, returnable glass bottles were typically used ten to fifteen times before being discarded.¹⁰ By replacing them with non-returnables, the container market could be increased 900% to 1400% over the then existing market. To achieve this growth, the container industry marketed "convenience" instead of conservation to the American consumer.

In addition to the appeal of disposables, other factors combined to create the current container crisis. Advertisements which extolled the virtues of "throwaway" convenience became a license to litter.¹¹ Moreover, as a result of post-war affluence, Americans consumed more beverages. Between 1957 and 1972, beverage consumption rose 33% while the use of throwaways increased 221%.¹² The public, however, did not foresee the magnitude of the hidden or external costs associated with throwaway containers.

9. "In 1958, only two percent of soft drink and 42 percent of beer containers were non-returnable. By 1972, 59% of soft drink and 77% of beer containers were non-returnable." Gudger & Walters, *Beverage Container Regulation: Economic Implications and Suggestions for Model Legislation*, 5 *ECOLOGY L.Q.* 265, 265 (1976).

10. See *DISPOSING OF NON-RETURNABLES*, *supra* note 4, at 1.

11. See Hatfield & Owens, *Minimum Deposits for Beverage Containers: National Impacts and Current Federal Legislation*, 8 *B.C. ENVTL. AFF. L. REV.* 1, 2 (1979).

12. See *DISPOSING OF NON-RETURNABLES*, *supra* note 4, at 1 (citing *Nonreturnable Beverage Container Prohibition Act: Hearings on S. 2062 Before the Subcomm. on the Env't of the Senate Comm. on Commerce*, 93d Cong., 2d Sess. 135-47 (1974) (statement of John R. Quarles, Jr., Deputy Adm'r EPA)).

Environmentalists lobbying for state legislation in the early 1970's stressed the external costs associated with throwaways which aggregate to millions of dollars annually.¹³ These costs include expenditures to pick up roadside litter, loss of dwindling landfill space, and depletion of mineral resources — both raw materials and energy needed for container production. It is estimated that 100 billion non-returnable containers are manufactured annually and that 25% of them end up as litter.¹⁴ Each year \$500 million is spent by federal, state, and local governments to pick up roadside litter,¹⁵ a large portion of which is beverage containers.¹⁶ Disposable cans and bottles are a burden on landfill areas, because they comprise 60 to 80% of all solid waste by volume and 20 to 40% by piece.¹⁷ The high costs of roadside cleanup and new landfill areas are paid directly by the taxpayer. Expenses that citizens may not be aware of, however, are the perhaps, inestimable costs of depleting irreplaceable mineral and energy resources, a less obvious, but nevertheless serious problem associated with disposable containers.

To meet these problems, state or national legislation, not fragmented cleanup campaigns, was needed. In 1971, a national bill was first introduced in Congress¹⁸ and a container statute reached the Oregon legislature.¹⁹ Although the federal legislation was defeated, Oregon passed the nation's first state bottle bill, a bill that withstood industry challenges brought on constitutional

13. See Hatfield & Owens, *supra* note 11, at 4.

14. *Id.* at 2-3. The figure of 100 billion containers is based on industry estimates in 1974 of the projected volume by 1980. The 25% throwaway figure is based on estimates in 1979 that one out of four of the 60 billion containers then manufactured annually were littered.

15. *Id.* at 4.

16. *Id.* Litter volume dropped 21% in Oregon and 35% in Vermont after container laws were implemented. Total litter could be reduced 40% by enactment of a national bottle bill. *Id.*

17. *Id.*

18. According to Sandy Nelson at Environmental Action, federal container legislation has been introduced in every congressional session since 1971. Telephone interview with Sandy Nelson, National Deposit Coordinator, Environmental Action, Washington, D.C. (Aug. 8, 1983).

19. See DISPOSING OF NON-RETURNABLES, *supra* note 4, at 17-18.

The Oregon House Bill 1036 passed in 1971 after the legislature had failed to pass a similar measure in 1969. The bill was signed into law by the Governor following heated debate and became effective October 1, 1972. OR. REV. STAT. §§ 459.810-.995 (Supp. 1981).

grounds.²⁰ Vermont followed Oregon's lead one year later.²¹ By

20. OR. REV. STAT. §§ 459.810-.995 (Supp. 1981) (passed in 1971).

In 1973, the Oregon Court of Appeals upheld the constitutionality of Oregon's bottle bill. *American Can Co. v. Oregon Liquor Control Comm'n*, 15 Or. App. 618, 517 P.2d 691 (1973).

The bottle bill, in effect since 1972, was attacked by the industry plaintiffs as violating the commerce clause of the United States Constitution and the equal protection and due process clauses of the fourteenth amendment. All three challenges were denied.

Plaintiffs' commerce clause argument, the strongest of the three, contended that the bottle bill was an unreasonable interference with interstate commerce because of its adverse impact on the distribution chain. The industry argued that disposable containers were crucial to regional and national markets, that a mandatory deposit would result in decreased consumption, and that recycling would excessively burden out-of-state bottlers who had to travel greater distances to collect bottles than in-state distributors. *See generally* G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 347 (1975).

Industry plaintiffs urged the court of appeals to use the traditional commerce clause "balancing test" to determine if the burdensome impact on interstate commerce was justified by the putative benefit to the state. The balancing test, enunciated in *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970), states that "[w]here the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* Plaintiffs argued that the adverse impact on interstate commerce outweighed the state's interest and that state police power must yield to federal authority. Secondly, the industry argued that alternative, less burdensome means of litter control could achieve the state's cleanup goals.

The Oregon court declined to use the balancing test, finding it inappropriate in cases involving the public welfare. The court noted that since the process of weighing social and economic values had been constitutionally assigned to the legislature, a valid exercise of its police power would not be overturned because of an adverse impact on certain economic interests. The court explained:

The blight of the landscape, the appropriation of lands for solid waste disposal, and the injury to children's feet caused by pull-tops discarded in the sands of our ocean shores are concerns not divisible by the same units of measurement as is the economic loss to elements of the beverage industry and we are unable to weigh them one against the other.

American Can Co. v. Oregon Liquor Control Comm'n, 15 Or. App. at —, 517 P.2d at 697.

The court also dismissed the equal protection argument by reasoning that even though other types of containers might also create litter and solid waste, it was within the legislature's discretion to regulate, as a first step in an otherwise valid program, those containers produced by the beer and soft drink industry. *Id.* at —, 517 P.2d at 704. The court declined to consider seriously the substantive due process argument that plaintiffs had been denied a property right by the regulation. *Id.* at —, 517 P.2d at 703-04. The Oregon Supreme Court denied review of the decision. *Oregon Medical Ass'n v. Rawls*, 281 Or. 293, 298, 574 P.2d 1103, 1105-06 (1978). Plaintiffs did not seek review before the United States Supreme Court. After the 1973 Oregon decision, the industry focused its bottle bill attacks through public referenda rather than through the judiciary. *See infra* note 70 and accompanying text.

The next important judicial decision on container regulation was not until 1981 when the United States Supreme Court held that a Minnesota statute banning the sale

the end of 1982, nine states,²² including New York, had enacted legislation that provides strong consumer and industry incentives to return and recycle containers.

B. *Regulatory Features of Bottle Bills*

A common feature of all container recycling statutes is the requirement that a retailer or authorized redemption center must pay the customer a minimum refund for every returned container. Several statutes describe the mandatory refund as a "minimum" fee.²³ Most states have set their minimum refund to the consumer at five cents for a brand name container, although

of milk in non-refillable plastic containers did not violate the equal protection clause of the fourteenth amendment. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981). Industry plaintiffs argued that the statute was discriminatory because it permitted milk to be sold in non-recyclable cartons made of materials, other than plastic, such as cardboard. The Supreme Court dismissed the equal protection claim by deferring to the Minnesota legislature which "could rationally have decided that its ban on plastic non-returnable milk jugs might foster greater use of environmentally desirable alternatives." *Id.* at 466. The stated objectives of the Minnesota statute were to promote resource conservation, to ease solid waste disposal problems, and to conserve energy. *Id.* at 461-62.

Furthermore, the Supreme Court found that the Minnesota statute did not violate the commerce clause because it did not discriminate between interstate and intrastate retailers, but regulated both evenhandedly, and the burden imposed on interstate commerce was relatively minor. The decision reversed an unreported ruling in favor of the industry by the Minnesota District Court that was affirmed by the Minnesota Supreme Court, *Clover Leaf Creamery Co. v. Minnesota*, 289 N.W.2d 79 (Minn. 1979), *rev'd*, 449 U.S. 456 (1981), which had found that the discrimination effected by the statute was not reasonably related to its purpose.

After these two decisions, it seems clear that in the area of state environmental regulation of litter and solid waste, courts are willing to grant considerable deference to legislative wisdom. Secondly, both cases may be cited for the proposition that the equal protection clause is not violated when certain industries or certain types of containers are singled out for regulation if that regulation is rationally related to environmental management. *See generally* Note, *Container Legislation. Equal Protection. Commerce Clause*, 15 AKRON L. REV. 390 (1981).

21. VT. STAT. ANN. tit. 10, §§ 1521-1527 (Supp. 1983).

22. The nine states, listed in order of passage, with mandatory container legislation are: Oregon, OR. REV. STAT. §§ 459.810-.995 (Supp. 1981); Vermont, VT. STAT. ANN. tit. 10, §§ 1521-1527 (Supp. 1983); Michigan, MICH. COMP. LAWS ANN. §§ 445.571-.576 (West Supp. 1983); Maine, ME. REV. STAT. ANN. tit. 32, §§ 1861-1871 (Supp. 1982); Connecticut, CONN. GEN. STAT. ANN. §§ 22a-243 to -251 (West Supp. 1983); Iowa, IOWA CODE ANN. §§ 455 C.1-.14 (West Supp. 1983); Delaware, DEL. CODE ANN. tit. 7, §§ 6051-6060 (Supp. 1982); Massachusetts, MASS. GEN. LAWS ANN. ch. 94, §§ 321-327 (West Supp. 1983); New York, N.Y. ENVTL. CONSERV. LAW §§ 27-1001 to -1019 (McKinney Supp. 1982).

23. *See, e.g.*, OR. REV. STAT. §459.820 (Supp. 1981) (every container shall have a refund value of not less than five cents).

one state has already increased that amount to ten cents.²⁴ Usually the retailer must accept any empty container of a beverage brand and bottle size which he sells if the container is not defective and does not contain foreign materials. The retailer usually receives a handling fee from the manufacturer to cover the cost of accepting, sorting, and storing the returnables.²⁵

In addition to requiring minimum refunds for bottles, most statutes ban pull-tops on metal cans, as they are a source of injury to people and animals.²⁶ A majority of states also ban non-biodegradable plastic connecting loops used to hold six pack units together because they are slow to decompose and they are unsafe for animals.²⁷

Most bottle bills regulate containers for malt beverages (beer and ale) and soft drinks, but not those for wine, "hard" liquor, milk, or fruit juice.²⁸ No statutes currently regulate non-beverage containers for such items as condiments or baby foods. The usual explanation offered for not regulating these containers is that they are simply not a major source of roadside litter.²⁹

24. Michigan amended its statute in 1978 to raise the minimum refund to ten cents for a standard size container, the highest in the nation. MICH. COMP. LAWS ANN. § 445.572 (West Supp. 1983). Other states including New York may redeem liter-sized containers for ten cents. Telephone interview with Judith Enck, Executive Director, Environmental Planning Lobby, Albany, N.Y. (Aug. 1, 1983). See Appendix for a comparison of state refund values.

25. Minimum handling fees are set by statute in seven states and vary from one to two cents per container. The amount is sometimes expressed as a percentage of the deposit so that as the refund goes up, the handling fee automatically increases. See Appendix for a comparison of handling fees.

26. Of nine states enacting minimum deposit laws, only Michigan and Massachusetts do not prohibit pull-top cans.

27. The six states which prohibit retaining loops are: Oregon, OR. REV. STAT. 459.850(5) (Supp. 1981); Vermont, VT. STAT. ANN. tit. 10, § 1525(a)(2) (Supp. 1983); Maine, ME. REV. STAT. ANN. tit. 32, § 1868.2 (Supp. 1982); Delaware, DEL. CODE ANN. tit. 7 § 6059.(2) (Supp. 1982); Massachusetts, MASS. GEN. LAWS ANN. ch. 94, § 324 (West Supp. 1983); and New York, N.Y. ENVTL. CONSERV. LAW § 27-1011(4) (McKinney Supp. 1982). Massachusetts is the only state to prohibit loops, but not pull-tops. Farmers complain that cows and other domestic animals eat the plastic loops littered along the roadside and environmentalists cite harm to fowl and small mammals which get caught in the loops. See DISPOSING OF NON-RETURNABLES, *supra* note 4, at 8.

28. Iowa's Beverage Containers Deposit Law does require a minimum deposit on "alcoholic liquor" containers. IOWA CODE ANN. § 455 C.1 (West Supp. 1983). The law further provides that \$100,000 annually be transferred to the Iowa Department of Substance Abuse "for the care, maintenance, and treatment of alcoholics." *Id.* at § 455 C.11.

29. See DISPOSING OF NON-RETURNABLES, *supra* note 4, at 47.

There are two types of bottles in the container industry, brand name and certified, an industry name for a standardized bottle. Two state statutes make separate provision for each.³⁰ Brand name bottles are used almost exclusively in the soft drink industry where consumer identification is linked to the size, shape, color, and name embossed on the glass bottle.³¹ For instance, most people know that a "Coke" bottle looks different than a "Pepsi" bottle. In the beer industry, some containers carry brand names, but many are certified bottles which, because of their standard size, shape, and color, may be reused by any manufacturer.³² Refunds for certified containers are sometimes less than for brand names because they are more fungible in the recycling system.

Although the consumer receives a smaller refund for certified containers, they are redeemed at the highest rate of all returnables.³³ Their return rate indicates that convenience, more than cash, is the key to a successful recycling program. With certified bottles, consumers do not have to find a store which sells a particular brand or size to be certain of receiving a refund. Manufacturers save money because they can retrieve a certified bottle more cheaply than producing a new one.³⁴ Retailers do not experience the same sorting and handling problems as they do with brand name bottles.

Most state statutes require the retailer to accept all containers of products he sells, provided that they are empty, clean, and undamaged.³⁵ This provision is in response to an industry objection that storing sticky bottles is unsanitary and attracts insects.³⁶ Broken bottles may also be refused.³⁷ This provision

30. Oregon refunds a minimum of two cents for a certified container, OR. REV. STAT. §459.820(2) (Supp. 1981), and five cents for a brand name container. *Id.* at § 459.820(1). Michigan refunds certified containers for a minimum of five cents each and brand name containers for ten cents each. MICH. COMP. LAWS ANN. § 445.571(d) (West Supp. 1983). Other states with certified containers redeem them at the standard refund value.

31. See Gudger & Walters, *supra* note 9, at 284.

32. *Id.*

33. In Oregon, 95% of all packaged beer was sold in certified containers within four years after passage of the state's bottle bill. Consumer return rates were 94% for certified containers, 91% for non-certified soft drink containers, and only 70% for cans. *Id.* at 271 n.26.

34. See DISPOSING OF NON-RETURNABLES, *supra* note 4, at 50-51.

35. See, e.g., N.Y. ENVTL. CONSERV. LAW § 27-1009(2) (McKinney Supp. 1982).

36. See DISPOSING OF NON-RETURNABLES, *supra* note 4, at 119-20.

reduces the retailer's costs and the likelihood that workers will be injured handling the bottles.

All state bills provide an option for retailers and distributors to establish redemption centers in locations separate from retail outlets.³⁸ This provision is a further effort to alleviate retail concerns about limited or unsanitary storage space. Retailers, however, often find that savings in storage and handling costs are outweighed by other factors.³⁹ Retailers who use redemption centers may lose customers to more convenient stores that accept containers; a customer generally spends his refund in the store where he receives it. Since redemption centers do not generate profit, retailers and distributors must finance them, resulting in additional, and probably unnecessary, costs. Further, the consumer is inconvenienced, and recycling is less effective, if the consumer must make an extra trip to the redemption center instead of returning empties on the next trip to the store.⁴⁰

The state administrative agency which oversees enforcement of bottle bill legislation varies from state to state. In most instances, it is the state's environmental agency, but some have designated the liquor control commission or even the department of agriculture to enforce their bottle law.⁴¹ Commentators urge that the "best" agency is one which presently administers similar regulations for alcoholic beverages, health standards, or environmental efforts.⁴² All states except Iowa have civil penalty

37. *Id.*

38. N.Y. ENVTL. CONSERV. LAW § 27-1013 (McKinney Supp. 1982).

39. See DISPOSING OF NON-RETURNABLES, *supra* note 4 at 85.

40. Redemption centers are not mandatory in any state. Most states allow for any person to establish a center with approval of the law's governing agency. Since such centers are non-profit and they are not likely to be established without industry financing, the decision will therefore rest with the retailers and distributors. See DISPOSING OF NON-RETURNABLES, *supra* note 4, at 52. An environmental lobbyist points out that redemption centers could accept a variety of recycled items such as newspapers and jars so that a trip to return beverage containers need not be for a single purpose. Telephone interview, *supra* note 24.

41. In Oregon and Michigan, the Liquor Control Commission is the regulating agency. OR. REV. STAT. § 459.810(3) (Supp. 1981); MICH. COMP. LAWS ANN. §455.571(k) (West Supp. 1983). In Maine, it is the Department of Agriculture. ME. REV. STAT. ANN. tit. 32, § 1862(6) (Supp. 1982). In New York, the Department of Environmental Conservation enforces the law. N.Y. ENVTL. CONSERV. LAW § 27-1003(5) (McKinney Supp. 1982). See Appendix for a comparison of state agencies.

42. See DISPOSING OF NON-RETURNABLES, *supra* note 4, at 47.

provisions with fines ranging from \$100 to \$1000 — often for every day the violation persists. Some states have criminal penalties.⁴³ Penalties are invoked to dissuade distributors and retailers from refusing empty containers.

All state statutes become effective one to two years after the statute is passed. The interim period between the time the bill passes and the time the bill becomes effective is designed to allow the industry to plan the recycling system, to use existing inventories of containers with pull-tops or plastic loops, and to allow states time to advise citizens of the new law.

Features that are *not* common to all bottle bills are provisions for continued public education programs and studies to monitor the effects of the bill. Two statutes specifically provide for on-going educational programs designed for travelers and school children.⁴⁴ Only Oregon and New York⁴⁵ require studies to measure the early economic and environmental effects occasioned by the new legislation. Nevertheless, although other statutes do not require such studies, most states have conducted these impact studies;⁴⁶ the results have been used to weigh the advantages and disadvantages of bottle bills.

Through subtle variation in bottle bill features, states have had an opportunity to resume their role as "laboratories for the nation's concerns."⁴⁷ States have taken the initiative in container regulation, and will continue to do so in the absence of

43. See Appendix for a comparison of the penalty provisions.

44. Vermont and Delaware provide for information programs which require that travel pamphlets, road maps, and similar publications have a standard announcement informing travelers of the container law and urging compliance. VT. STAT. ANN. tit. 10, § 1526(a) (Supp. 1983); DEL. CODE ANN. tit. 7, § 6058(a) (Supp. 1982). In addition, both states have instructed their departments of public instruction to distribute anti-litter information in primary and secondary schools. VT. STAT. ANN. tit. 10, § 1526(b) (Supp. 1983); DEL. CODE ANN. tit. 7, § 6058(b) (Supp. 1982).

45. Returnable Beverage Containers (Bottle Law), ch. 149, sec. 7, 1983 N.Y. Laws 349 (amending ch. 200, sec. 10, 1982 N.Y. Laws 619). See *infra* notes 114-15 and accompanying text (discussion of the New York study). A report is due by December 31, 1984, approximately sixteen months after the law goes into effect in September, 1983. For information regarding the Oregon study, see DISPOSING OF NON-RETURNABLES, *supra* note 4, at 23.

46. See, e.g., DISPOSING OF NON-RETURNABLES, *supra* note 4, at 31-32, for a discussion of studies conducted in Vermont.

47. *State Recycling Program Announced: Plan to Pay Steel, Aluminum Cans*, ENV'T REP. (BNA) No. 25, at 825 (Oct. 17, 1980) (citing remarks of the Governor of Arkansas, Bill Clinton).

a national bill. Since the federal government has usually taken the lead in environmental regulation, the innovative role states have assumed in this sphere is somewhat novel.

III. Industry Opposition to Container Laws

Since the first bottle bill was passed in 1971, eight other states have enacted similar legislation, and nine states have defeated such measures.⁴⁸ The defeats demonstrate that bottle bills are controversial and that industry trade associations are formidable opponents for citizens' groups and coalitions that lobby in favor of container laws.⁴⁹ For every environmentalist who argues that recycling reduces litter, solid waste, and the depletion of mineral resources, there is a bottling industry opponent who disputes the validity of these arguments and contends that bottle bills increase beverage costs, cause unemployment, and create problems with container handling logistics.⁵⁰ Philosophically, the container and beverage industry maintains that it is being singled out by legislators and the public to assume more than a fair share of environmental clean up costs. This discrimination is attributed to the high visibility of littered containers and, in the case of beer, a long history of regulation. Practically, the industry advances several arguments, one of which is that it is unreasonable to assume that the container industry can return to a recycling system that functioned through the 1950's, since the market has changed dramatically in the past thirty years.⁵¹

48. See *supra* note 22 (list of the nine states which have passed container laws since 1971). The nine states which have defeated bottle bills by public referendum since 1970 are Alaska, Arizona, California, Colorado, Montana, Nebraska, Ohio, Washington, and Massachusetts (which defeated legislation in 1976 but passed it in 1982). Voters in three states have upheld container legislation since 1976: Michigan, Massachusetts, and Maine. See generally *Why the New York State Beverage Container Mandatory Deposit Law Should Be Repealed*, Robert C. Donovan, Regional Public Affairs Director, Owens-Illinois, Inc., Brockport, New York at 2 (Nov. 1982) [hereinafter cited as *Owens-Illinois Report*].

Efforts to repeal legislation were defeated in Maine in 1979 and Massachusetts in 1982. No state that has enacted a bottle bill has repealed it after its effective date. *Id.*

49. As the Governor of Vermont noted during his state's bottle bill battle, "[T]he National Brewers' Association and other big guns in the industry are sending in the troops to beat little Vermont into the bullrusher." See *DISPOSING OF NON-RETURNABLES*, *supra* note 4, at 55 (citing the *Rutland Daily Herald*, Oct. 4, 1973).

50. See, e.g., *Owens-Illinois Report*, *supra* note 48, at 2.

51. *Id.* at 3-6.

These arguments have formed the basis for repeated industry victories.

The industry has defeated bottle bills in nine states since 1970 by direct vote.⁵² In their pre-election campaigns, industry lobbyists have disputed purported reductions in litter, solid waste, and energy resources. Instead, they argue for alternative ways to reduce litter. The gist of the industry argument is that even if disposable containers create problems, mandatory deposit laws are neither an equitable nor an efficient system to alleviate these ills. First, the industry asserts that litter continues to be a problem even after bottle bills are implemented and that the cost of such legislation outweighs the benefits. In an industry prepared report written to effect repeal of New York's bottle bill, the industry concluded that "a mandated deposit on soft drink and beer containers in no way guarantees clean roadsides," and that the legislation is a "merely symbolic attack on litter."⁵³ In Michigan, a state-sponsored study two years after the bottle bill became effective, indicated that total litter may have increased by ten percent. Although Michigan's litter from beverage containers was reduced, the industry notes that it was only nine percent by volume and eighteen percent by weight, suggesting that these figures are not significant reductions compared to beverage cost increases of \$200 million per year in that state.⁵⁴ In addition to challenging purported reductions in litter, the industry argues that beverage containers are only about five percent of the total solid waste volume and thus not worth the added expense.⁵⁵ With respect to the environmentalists' contention that bottle bills conserve resources and energy, industry opponents counter that there will be increased water use for cleaning the bottles and increased gasoline consumption for additional trips to return bottles.⁵⁶

Moreover, the industry argues that there is a hidden tax factor in such measures: a state legislature would not pass a bill calling for \$100 million in new taxes to reduce litter, although it

52. *Id.* at 2.

53. *Id.* at 3.

54. *Id.* at 4.

55. *Id.* at 8.

56. Sec'y of State, Cal. Ballot Pamphlet for the Gen. Election 45 (Nov. 2, 1982).

is willing to pass that increase on to consumers in higher beverage costs.⁵⁷ The industry opponents project that the increased costs in New York will exceed one dollar per case or more than \$400 million annually.⁵⁸ These costs come from the reverse distribution process by which containers are routed back to the distributor, and from unclaimed deposits which are "paid" by the consumer if he does not return the container.

Furthermore, opponents contend that thousands of jobs are lost in the container industry, in related companies which supply goods and services to manufacturers, and in the trucking industry.⁵⁹ They project a minimum reduction in container usage of thirty-three percent in New York as a result of the bottle bill.⁶⁰ They also point out that, based on sales in Maine, Michigan, and Connecticut, there is at least a ten percent drop in beverage sales due to higher prices and consumer inconvenience.⁶¹

Finally, the industry argues that bottle bills are a major annoyance for consumers and that the litter problem is caused by "a very few people with bad manners."⁶² As an alternative, the industry favors "a better approach: enforcement of existing laws, education programs for young people and support for existing voluntary recycling."⁶³

To publicize these arguments, opponents have expended considerable sums in lobbying efforts to defeat bottle bills. William Coors, president of Adolf Coors Brewing Company, testified

57. See Owens-Illinois Report, *supra* note 48, at 5. What this argument does not acknowledge is that New Yorkers are already spending millions of dollars annually in litter and solid waste costs.

58. *Id.* at 6.

59. *Id.* Proponents argue that jobs are gained in other areas and that a net gain in unemployment, particularly in unskilled and semi-skilled jobs, results. The real dispute seems to be that the lost jobs are "highly paid and skilled jobs ranging from \$18,000-\$35,000 per year" according to the Glass Bottle Blowers Association of the AFL-CIO. *Id.* at 7.

60. *Id.* The industry opponents argue that this decrease would result in 3200 - 4150 lost jobs in container and teamster industries. A New York study prepared by the State Office of Development Planning predicted 5000 new jobs as a result of recycling and refilling operations. See *infra* notes 77-78 and accompanying text.

61. Owens-Illinois Report, *supra* note 48, at 7. Proponents counter that although initial drops do occur, sales rebuild and level off, usually within one year of implementation. See Gudger & Walters, *supra* note 9, at 287.

62. See Cal. Ballot Pamphlet, *supra* note 56, at 44.

63. *Id.* at 45. See *infra* note 97 for a discussion of the disadvantages of voluntary recycling programs.

in the mid-1970's that the industry spent a "minimum of \$20 million a year fighting container deposit legislation."⁶⁴ An environmental lobbyist indicates that spending probably remains near that figure, and that eleven million dollars was spent in five states which had container laws on their ballots in 1982.⁶⁵ Bottle bill proponents contend that because of budget limitations, they are ill-prepared to fight the expensive campaigns financed by the container industry.⁶⁶

These massive expenditures and intensive lobbying efforts have been successful, notwithstanding nine industry defeats. A 1975 monograph⁶⁷ indicated that although only Oregon and Vermont had passed bottle bills as of that date, every state in the Union had considered one.⁶⁸ In the 1982 elections there were more bottle bills before voters than ever before.⁶⁹

The November, 1982 elections were indicative of the history of industry successes. Bottle bills were defeated in 1982 by voters in four states: Arizona, Washington, Colorado, and California.⁷⁰ In response to these defeats, industry lobbyists note that the last time bottle bills passed by popular vote was in 1976, when both Maine and Michigan approved voter referenda.⁷¹ Despite the defeats, an important victory was won in Massachusetts in 1982, where voters rejected a referendum to repeal their

64. See DISPOSING OF NON-RETURNABLES, *supra* note 4, at 55.

65. Telephone interview, *supra* note 18.

66. Wells, *California Fight on Banning Throwaways Could Affect Prospects for National Law*, Wall St. J., Oct. 15, 1982, at 37, col. 4 [hereinafter cited as Wells].

67. See DISPOSING OF NON-RETURNABLES, *supra* note 4, at 55.

68. *Id.* at 65.

69. See Owens-Illinois Report, *supra* note 48, at 2. There were five voter referenda in 1982: Arizona, California, Colorado, Massachusetts, and Washington; only Massachusetts upheld legislation. In 1976, there were four: Colorado, Maine, Massachusetts, and Michigan. Maine and Michigan upheld legislation that year.

70. A California voter initiative, Proposition 11, organized after the state assembly had failed to pass a bottle bill since the 1970's suffered an unexpected defeat (only 44% voted to pass the bill). Only two weeks before the California election, polls indicated that between 57 and 61% of the voters supported the initiative. Wells, *supra* note 66, at 37. Proponents anticipated that the passage of a bottle bill in New York and California, the two most populous states, would signal to Congress a voter mandate for a national container deposit law. Instead, a pre-election media blitz utilizing television commercials and direct mail letters to two million voters resulted in a crucial defeat. See *TV Blitz Cans Bottle Bills*, IN THESE TIMES 7 (Nov. 17, 1982) [hereinafter cited as IN THESE TIMES].

71. See Owens-Illinois Report, *supra* note 48, at 2.

new bottle bill.⁷² In New York, the state legislature's bill was signed into law in June, 1982 and, although amended in 1983,⁷³ was not repealed or substantially altered.⁷⁴

IV. The New York Experience

A. Legislative Background

A review of the legislative history of New York's bottle bill provides a revealing glimpse of the political forces that determine the fate of controversial enactments. In New York, the State Assembly Committee on Commerce, Industry and Economic Development had considered a bottle bill every year since the early 1970's, but heavy industry lobbying had kept the bill off the floor for a vote. In recent years, support for the bill was felt to be growing with predictions that the bill would pass the Assembly, and perhaps the Senate, if it could get out of committee.⁷⁵

On the other hand, then Governor Hugh Carey, whose term ended in January, 1983, had indicated in 1981 his inclination to veto the bill, citing the need for more data.⁷⁶ The Governor's call for additional information was met by the State Office of Development Planning in a report initially issued in March, 1981 and followed by a more extensive report in June, 1981.

The March report predicted that while consumer beverage costs could rise by \$200 million annually, the cost would be offset by income produced by the creation of 5000 new jobs.⁷⁷ Although several hundred jobs could be lost in the glass container industry as a result of reduced production, these losses would be offset by jobs created in transportation, recycling, refilling, and

72. See *IN THESE TIMES*, *supra* note 70. In Massachusetts, voters upheld by a 59% to 41% margin a container law previously passed by the state legislature, despite a two million dollar battle waged by the beverage container industry to repeal the bottle bill.

73. Returnable Beverage Containers (Bottle Law), ch. 149, sec. 1, 1983 N.Y. Laws 346 (amending N.Y. ENVTL. CONSERV. LAW § 27-1001 to -1019 (McKinney Supp. 1982)).

74. New York has no state provision for voter initiatives or referenda so that repeal is possible only by the state legislature.

75. N.Y. Times, Mar. 15, 1982, at B1, col. 2.

76. Albany Times Union, June 3, 1981, at 4, col. 3.

77. *Id.*, Mar. 16, 1982, at 3, col. 3. The \$200 million increase is based on estimates of a twelve to fifteen cent increase per six pack of beer.

warehousing operations.⁷⁸ The report also indicated that litter would be substantially reduced, energy would be saved, and localities would reduce solid waste disposal costs.⁷⁹

The report concluded that although mandatory deposit legislation might initially increase costs slightly, if the price of materials, production, and energy continued to increase, such deposits "may prove to be the wisest course" from an economic point of view.⁸⁰ The second report, released June 1, 1981, generally favored the bottle bill, but urged that the bill be delayed until unresolved economic questions were answered.⁸¹ Consequently, the Assembly Committee voted down the bill.

Despite this defeat, bottle bill supporters were optimistic for two reasons. First, they saw the favorable report as the basis of a shift in the Governor's anti-bottle bill position. Second, the Assembly Speaker who had previously assigned the bill to the Commerce Committee announced that for the 1982 legislative session, the bottle bill would be assigned to the "more sympathetic Environmental Conservation Committee."⁸²

In March, 1982, a final staff report to Governor Carey from the State Office of Economic Planning containing a detailed analysis of cost projections by brewers, bottlers, and distributors concluded that many of the arguments regarding costs were "unfounded."⁸³ Aides to the Governor predicted that this report would be the basis for the Governor's abandonment of his previous opposition to the measure.⁸⁴ The report predicted that the bill would raise the cost of a bottle of beer approximately two to two and one-half cents, but that the industry's warnings of severe adverse economic effects stemming from unemployment, decreased profitability, and the industry's inability to absorb capital costs were unsubstantiated.⁸⁵ While industry sources had warned of the loss of 7000 jobs, the state report found that only

78. *Id.*

79. *Id.*

80. *Id.*

81. N.Y. Times, June 12, 1981, at B2, col. 3. An environmental lobbyist suggests that the primary reason for the defeat in 1981 was political pressure, not a lack of information regarding costs. Telephone interview, *supra* note 24.

82. N.Y. Times, June 12, 1981, at B2, col. 3. The bill, in fact, was never reassigned.

83. *Id.* Mar. 15, 1982, at B1, col. 5.

84. *Id.*

85. *Id.*

600 would be lost in the "worst case," and that a net gain of 5000 jobs could result from recycling and refilling operations. The report went on to point out that the five to seven percent reduction in solid waste previously estimated by the Office of Economic Development would result in a twenty-five million dollar savings to localities, but it rejected proponents' optimistic estimates that the price of beverages would actually decline.⁸⁶

The Office of Economic Development also disputed the costs estimated by the United States Brewers' Association which included \$609 million in capital outlays for new bottling equipment, trucks, and storage space. It projected, instead, a capital investment of \$286 to \$350 million. It noted that these costs were manageable, since they would be offset by income from recycling and unclaimed deposits which distributors would keep.⁸⁷

The report produced immediate reaction. The bill's sponsor predicted that after the report, "the Governor would be hard-pressed to justify a veto."⁸⁸ A *New York Times* observer speculated that since the Governor was not seeking re-election in 1982 and had already paid off his outstanding campaign debts, legislators hoped he would be free from political pressures. This freedom allowed the Governor to abandon his previous support of business interests and act on the merits of the bill.⁸⁹

B. *The Industry Alternative*

The shift in favor of New York's bottle bill by the Governor and the Speaker of the Assembly, both of whom had previously been responsive to industry lobbying efforts, caught the

86. *Id.* The report made no recommendations, observing that costs and benefits "cannot be equated in any quantifiable fashion." *Id.* Industry opponents criticized staff members of the Office of Economic Development as being "pro-bottle bill." The author of the report said that his personal support of the legislation had been "irrelevant" in preparing the document. *Id.*

87. *Id.* at B6, col. 1. See discussion *infra* notes 121-28 and accompanying text on sources of distributor income.

88. *N.Y. Times*, Mar. 15, 1982, at B1, col. 5.

89. *N.Y. Times*, June 12, 1981, at B2, col. 3. In response to signals that the Assembly was giving serious consideration to the bill, the president of a Westchester County beverage distributor advised 150 other chief executive officers to contact the Governor voicing their opposition. Reportedly, about 60 executives phoned the Governor's office. *Id.*

container industry by surprise.⁹⁰ Alarmed by their narrow escape at the end of the 1981 legislative session, industry lobbyists persuaded a New York State Senator to introduce a competing anti-litter bill in the 1982 legislative session.⁹¹ A compromise agreement announced by the Assembly Speaker allowed both bills to be brought to the Assembly floor for a vote. This was the first time that a New York bottle bill had made it out of committee in ten years of debate.⁹²

The industry's proposed alternative would allocate one percent of the state's corporate franchise tax to a state "Litter Control Program."⁹³ The tax which represented a five cents per case charge on beverage containers would expire after five years and would be void if a state or federal beverage container deposit law were passed.⁹⁴ A feature of the industry program was that it would reduce litter by paying teenagers and welfare recipients to pick up trash along selected state highways and public lands from June through August. The plan would also fund a litter education program. That program would allocate \$200 thousand for a temporary commission to develop a state recycling plan and would cost an estimated eleven million dollars annually.⁹⁵ The temporary commission would be replaced by a ten-member Litter Control Recycling Council with a permanent staff.⁹⁶ The program did not ban pull-top metal openers or plastic loop retainers. Unlike the bottle bill, it provided for minimal recycling, since without a five cent deposit paid by the distributor, there would be little economic incentive to sell the containers for

90. N.Y. Times, Mar. 15, 1982, at B6, cols. 1-2.

91. *Id.* The competing bill was introduced by Senator William T. Smith of Big Flats.

92. N.Y. Times, May 26, 1982, at B2, col. 3.

93. SIERRA CLUB NEWSLETTER, HUDSON MOHAWK GROUP, May-June 1982, at 1 [hereinafter cited as SIERRA CLUB NEWSLETTER].

94. *Id.*

95. *Id.* Opponents argued that such efforts would duplicate work already done for the Department of Environmental Conservation's Solid Waste Management Plan.

96. *Id.* at 2. In contrast to the Litter Control Program, the bottle bill would require no new bureaucracy, except for a temporary study commission. Industry supporters cited the effective use of litter control alternatives in Alaska, Arizona, California, Nebraska, Ohio, Washington, and New Jersey. See Owens-Illinois Report, *supra* note 48, at 2. Opponents indicated that similar programs had been repealed or reduced in Colorado, California, Connecticut, and Vermont. See SIERRA CLUB NEWSLETTER, *supra* note 93, at 2.

scrap.⁹⁷

C. *How the New York Bill Passed*

On May 25, 1982, the State Assembly voted on the bottle bill and the industry's Litter Control Program. Despite the fact that the two bills were inconsistent, legislators passed them both.⁹⁸ Although some assembly members were initially hesitant, once a majority voted in favor of the bottle bill, reluctant legislators joined the majority. The Litter Control bill passed by a smaller margin.⁹⁹ Since the Assembly voted in favor of both bills, commentators felt that the controversy had merely been passed on to the Senate.¹⁰⁰ When the Senate passed both bills, however, Governor Carey had the final decision on which bill would become law.

Although legislators had praised themselves for "great courage"¹⁰¹ in passing two inconsistent bills, the Governor chided them for their ambivalence.¹⁰² At the same time, Carey aides noted that they had prepared both a veto and an approval message for the bottle bill. Hours before the Governor signed the bottle bill, aides did not know which bill would be implemented.¹⁰³

In retrospect, it is ironic that it was the industry's effort to get its own bill on the Assembly floor for a vote that created the opportunity for state legislators to vote for both bills and thereby escape adverse political reaction. The industry that had been so politically effective in the past was instrumental in its

97. Opponents of the litter control law thought that, whereas the bottle bill penalized only those who did not return their containers, the litter control alternative required all taxpayers to share the \$11 million annual cost and reduced the recycling incentive. An Albany newspaper editorial criticized the litter bill because it "subsidizes people's sloppy habits." Albany Union Times, May 2, 1982, at C7, col. 1.

98. N.Y. Times, May 26, 1982, at B2, col. 1. Thirty legislators voted for both bills and three voted against both. According to a lobbyist for the bottle bill, "We were teetering within one or two votes the whole time. Once we got 76 votes, people flew out of the men's room." *Id.* at col. 3.

99. *Id.* The Litter Control Program passed by a vote of 85 to 61, fewer supporters and more opponents than the bottle bill.

100. *Id.*

101. *Id.*

102. *Id.* See also N.Y. Times, June 16, 1982, at B6, col. 3.

103. *Id.*

own defeat and in enacting the New York bottle bill.

D. *Provisions of the New York Bottle Bill*

New York's Returnable Container Act,¹⁰⁴ like most of its predecessors, encourages recycling by requiring a minimum five cent deposit on all beer and soft drink containers sold in the state.¹⁰⁵ The Act also bans pull-top metal openers and plastic connecting loops if they are not photodecomposable or biodegradable.¹⁰⁶ The law was postponed from its original effective date of July 1 to September 12, 1983, to allow inventory reductions of non-returnable containers.¹⁰⁷

The New York legislation contains many of the provisions discussed earlier which are common to most bottle bills.¹⁰⁸ All containers must be redeemed except those which are unclean, damaged, or lack state identification.¹⁰⁹ Like several other states, New York's statute provides that the name or initials of the state must appear on all containers.¹¹⁰ The Act, as amended, provides for a handling fee of one and one half cents to be paid by the distributor to the retailer.¹¹¹ The law provides an option to create redemption centers, though retailers and distributors

104. N.Y. ENVTL. CONSERV. LAW §§ 27-1001 to -1019 (McKinney Supp. 1982). The law states that it will provide a necessary incentive "for the economically efficient and environmentally benign collection and recycling of . . . containers." *Id.* at § 27-1001.

105. *Id.* at § 27-1005. According to the Environmental Planning Lobby, liter-sized bottles will probably be redeemed for ten cents each. Telephone interview, *supra* note 24. Only Michigan mandates a ten cent refund for regular size bottles. MICH. COMP. LAWS ANN. § 445.571(d) (West Supp. 1983).

106. Returnable Beverage Containers (Bottle Law), ch. 149, sec. 3, 1983 N.Y. Laws 347 (amending N.Y. ENVTL. CONSERV. LAW § 27-1011(4) (McKinney Supp. 1982)). Prior to its amendment, the law had banned all plastic loops without qualification.

107. *Id.* An environmentalist contends that the 10 week delay was a legislative concession to postpone compliance during the summer when beverage sales are at a peak. Telephone interview, *supra* note 24.

108. See *supra* notes 24-43 and accompanying text for a description of common provisions of bottle bills.

109. N.Y. ENVTL. CONSERV. LAW § 27-1009(2) (McKinney Supp. 1982).

110. *Id.* at § 27-1011(1). See Appendix for a comparison with other states.

111. Returnable Beverage Containers (Bottle Law), ch. 149, sec. 1, 1983 N.Y. Laws 346 (amending N.Y. ENVTL. CONSERV. LAW § 27-1007(3) (McKinney Supp. 1982)). These fees, originally set at 20% of the refund value or one cent, were raised by subsequent amendment. At least one environmental lobbyist thinks this cost is part of a deliberate industry effort to make the price increases artificially high in order to create consumer resistance to the bottle bill. Telephone interview, *supra* note 24.

may choose not to establish them for the reasons discussed earlier.¹¹² Unlike some other laws, however, the New York statute does not have a provision for certified containers.¹¹³

New York's legislation calls for a temporary state commission to study the new law's statewide effect on environmental and economic interests.¹¹⁴ The commission's report on whether to continue or modify the statute is to be based, in part, on a consideration of the bottle bill's effectiveness in achieving its environmental goals. Such results are to be balanced against the economic impact on the beverage industry and the state in general. The commission is to give special consideration to the law's effect on small retailers, grocers, and tavern and restaurant owners.¹¹⁵

The New York bottle bill is administered by the state's Department of Environmental Conservation (D.E.C.), which is empowered to prosecute violators for public nuisances and to levy fines.¹¹⁶ In addition to fines, the D.E.C. is authorized to prosecute the fraudulent practice of double redemptions by distributors.¹¹⁷ The agency is also charged with promulgating regulations

112. N.Y. ENVTL. CONSERV. LAW § 27-1015 (McKinney Supp. 1982). See *supra* notes 39-40 and accompanying text for a discussion of redemption centers.

113. See, e.g., OR. REV. STAT. § 459.820(2) (Supp. 1981). Environmental lobbyists in New York were unable to override industry opposition to certified containers, a provision which was not in the original bill passed in 1982. Telephone interview, *supra* note 24.

114. Returnable Beverage Containers (Bottle Law), ch. 149, sec. 1, 1983 N.Y. Laws 346. That commission was to be formed by July 1, 1983. The July 1 deadline passed without the commission being named, which concerned some environmental groups which felt that the commission should be in operation prior to the effective date in order to gather pre-and post-enactment statistics. Telephone interview, *supra* note 24.

115. N.Y. ENVTL. CONSERV. LAW § 27-1001(4)(f) (McKinney Supp. 1982).

116. N.Y. ENVTL. CONSERV. LAW § 27-1015 (McKinney Supp. 1982). Penalties may be enforced against "any person who shall violate any provision of this title." *Id.* Those actually regulated are dealers (retailers), distributors, and redeemers at redemption centers. Fines are assessed for a retailer's refusal to accept an otherwise authorized container or refusal to refund a deposit. This penalty is a \$500 fine for each violation. *Id.*

117. Returnable Beverage Containers (Bottle Law), ch. 149, sec. 1, 1983 N.Y. Laws 346, states:

It shall be unlawful for a distributor, acting alone or aided by another, to return empty beverage containers to a dealer or redemption center for their refund value if the distributor had previously accepted such beverage containers from any dealer or operator of a redemption center. A violation of this subdivision shall be a misdemeanor punishable by a fine of not less than five hundred nor more than one thousand dollars and an amount equal to two times the amount of money received as a result of such violation.

for the act.¹¹⁸

V. Mechanics of a Bottle Bill: Exchanging Containers and Deposits

To understand the mechanics of the container distribution system and the monetary exchanges that accompany each transaction, a four step analysis and explanation of the recycling system follows.¹¹⁹ Essentially, there are three actors in the system: 1) the retailer (i.e., the grocer), who is the middleman between distributor and consumer, 2) the distributor, who is responsible for supplying the retailer with full containers, and 3) the consumer, who buys a beverage from the retailer and must return the empty container to reclaim his deposit. For simplicity, assume each of the four transactions involves 100 containers.

In step one, the retailer purchases 100 beverages from the distributor. The retailer must pay, in addition to the wholesale price of the beverage, a five cent deposit for each full container he receives. Thus, the retailer pays five dollars and the distributor "makes" five dollars, which the distributor will not have to repay until the 100 containers are returned. The retailer, therefore, has an out-of-pocket loss of five dollars in step one.

In step two, the retailer sells 100 beverages to a consumer. The consumer pays, in addition to the retail price of the beverage, a five cent deposit per container. This transaction allows the retailer to recoup his initial five dollar outlay, but only momentarily.

In step three, the consumer returns the 100 empty containers and collects his five dollar deposit. This redemption creates a second out-of-pocket expense for the retailer who must reimburse the consumer upon return of the containers. The retailer also incurs handling costs of one and a half cents per container for sorting and storing the empty containers.

Finally, in step four, the retailer redeems the 100 empty

Id.

118. *Id.* at 347.

119. The information which follows is taken from *Notes on Applying Individual State Figures and The Mechanics and Economics of a Deposit System for Beverage Containers*, handouts distributed by the Environmental Action Foundation's National Clearinghouse for Beverage Container Deposit Legislation, Washington, D.C.

containers, and the distributor pays him five dollars. In addition to the five dollar deposit, the retailer is reimbursed one dollar and fifty cents in handling fees. The reimbursement of these fees permits the retailer to break even on the recycling process, by allowing him to recoup the one and one half cent handling expense incurred in step three.

In contrast to the retailer, the distributor has a chance to make money. In the example given, he has had investment use of the retailer's five dollars for five to six weeks. In addition, he owns 100 empty containers to be sold as scrap. On the average, 90 to 95% of the original 100 containers will be returned. If 90 are redeemed, the distributor and the retailer will each keep fifty cents in unclaimed deposits — the distributor will keep the retailer's, the retailer will keep the consumer's. Unreturned containers are a continuing source of income for the distributor who, in the example given, repays the retailer only four dollars and fifty cents of his original five dollar deposit for 90 empty containers. If the unclaimed deposits seem a "windfall" to the distributor, they also represent the penalty that each consumer must pay when he litters, rather than redeems his container.

Proponents of bottle bills have developed formulae indicating that distributors, at least, can make enough money from recycling opportunities and unclaimed deposits to cover their handling fees, and perhaps, other related costs.¹²⁰ [While the bottle bills of New York and other states do not require that containers be reused, there is often an increase in the use of refillable glass bottles after container legislation is in place.]¹²¹ Even when bottles and cans are crushed, not reused, their sale as scrap yields a sizeable income. The container mix nationwide is 45% aluminum, 45% glass (20% of which is refillable, 25% of which

120. See *The Mechanics and Economics of a Deposit System for Beverage Containers*, *supra* note 119 (citing a United States General Accounting Office study which shows that the income and costs for the first year should be equal).

Since some of the expenses are capital investment costs, after the first year the annual income opportunities should exceed the operating costs of the system for both distributors and retailers. The same conclusion was reached by the accounting firm of Arthur Young & Co. in a study done for the beverage industry. *Id.*

121. See Owens-Illinois Report, *supra* note 48, at 7 (where Owens-Illinois, Inc. predicts "a minimum reduction in container usage of 33% in New York State as a result of the bottle bill.").

is single use), and 10% plastic.¹²² New Yorkers empty eight billion beverage containers annually.¹²³ Assuming a 90% return rate, the value of scrap aluminum to the industry in New York could be \$27,405,000 annually and the value of scrap glass could be \$40 million annually.¹²⁴ Many distributors do not now reclaim scrap materials, because there is less incentive to reclaim in the absence of a mandatory deposit law requiring a nickel for every redeemed container, whether recycled, or not.¹²⁵

In addition to the income from selling scrap materials, there is investment income to be made from the "float" in the early weeks after the law becomes operative. The "float" represents the deposits collected by the distributor from the retailer in the first five to six weeks before the containers start to be redeemed. Based on formulae developed by pro-bottle bill lobbyists, that investment income in New York could be \$4 million dollars.¹²⁶

122. *Notes on Applying State Figures*, *supra* note 119.

123. Enck, *Anti-Litter Activists Bottle Up Container Industry*, 43 Bus. & Soc'y Rev. 37, 41 (1982).

124. *The Mechanics and Economics of a Deposit System for Beverage Containers*, *supra* note 119. The formula for determining scrap value, promulgated by Environmental Action, is as follows:

- (1) ascertain the number of containers sold in the state;
- (2) compute 90% or 95% of that number (depending on which return rate more accurately reflects the state's success);
- (3) of the containers available for sale, determine what number are aluminum by multiplying by 45%;
- (4) divide the total number of aluminum cans for sale by 24 (the number of cans in a pound);
- (5) divide the total number of pounds by 2,000 (the number of pounds in a ton); and
- (6) multiply the number of tons by the current dollar value of aluminum scrap; the value as of Fall, 1982 was five dollars and eighty cents per ton.

Id.

To determine the figure for glass, compute a 90% return rate as above, and assuming that 25% of the returned bottles are single use, multiply by 25%; divide by two (the number of glass bottles per pound) and divide by 2000 to compute the number of tons available for sale. Multiply by \$80, the current value of glass scrap per ton.

125. *The Mechanics and Economics of a Deposit System for Beverage Containers*, *supra* note 119.

126. See *supra* note 119. The figure is calculated as follows: multiply the state's number of containers used annually by five cents to determine total annual deposits.

The "float" represents money that is available to the distributor for the first five to six weeks after the bill's effective date; after the initial period, the money collected from the retailer is offset by the money paid back to him for returned containers. Five to six weeks is approximately one tenth of a year, so that one tenth of the total annual deposits

A third source of income is from unclaimed deposits which are usually five to ten percent of the total deposits collected. Unclaimed deposits are kept by the distributor who also does not have to pay a one and one half cent handling fee. The amount of income generated annually in New York from unclaimed deposits and fees could be \$52 million.¹²⁷

VI. Future Trends

With bottle bills in effect in nine states as of 1983, environmentalists are pressing for a national bottle bill.¹²⁸ The rationale for national legislation is that if state container laws solve litter, solid waste, and energy problems at the state level, they will solve those problems even more efficiently on a national scale.¹²⁹ New York's bottle bill, since it is in effect in the nation's second most populous state in the country, will have a major influence on efforts to pass a national bill. If the bill is effective, Congress may be persuaded that success in New York signals the advent of a national bill.¹³⁰

On the other hand, environmentalists fear that for this very reason, the container industry will work to subvert an otherwise successful recycling system. To substantiate these fears, they point to industry sponsored amendments to the original legisla-

collected is investment income. That money can be invested in lucrative short term options and yield several million dollars before being returned to the retailer. *Id.* The four million dollar figure for New York was based on a conservative investment rate of 10%.

127. See *supra* note 119. The figure is calculated by assuming that 10% of the containers will not be returned and multiplying by the total number of containers to get the number of unreturned containers. Next, multiply the number of unreturned containers by 6.5 cents, the combined deposit and handling fee, to get the savings to the distributor.

128. According to Sandy Nelson of Environmental Action Foundation, legislation had been introduced in every Congressional session since 1971. Telephone interview, *supra* note 18. The chief senate sponsors, Mark O. Hatfield and Robert Packwood of Oregon, have introduced senate bill S1247 in the current session. Congressman Jeffords of Vermont has introduced a comparable bill, HR2960, in the House of Representatives.

129. See Hatfield & Owens, *supra* note 11, at 16. There are estimates of significant conservation savings with a national law: 40% reduction in litter, up to a 6% reduction in solid waste, reduced energy needs of 0.3%, a savings of 100 thousand barrels of oil per day, and conservation of domestic supplies of bauxite and iron ore.

130. According to a lobbyist at Environmental Action, New York City in particular is a crucial testing ground. "If a bottle bill works in New York City which has the most difficult retail system in the country, is there any place that couldn't implement a bottle bill?" Telephone interview, *supra* note 18.

tion which have already increased the handling fee.¹³¹ Furthermore, they note that the study period has been shortened from fifty-four months to sixteen months,¹³² which puts additional pressure on the state to implement the law smoothly and expeditiously.

With the effective implementation of container laws in Massachusetts¹³³ and New York,¹³⁴ and with new legislation in California underway,¹³⁵ the pressure will continue in the 1980's for a national bottle bill. If California passes a bottle bill, it is even possible that industry lobbying will subside, once the public and industry perceive the simplicity of one national system of mandatory deposits, rather than a variety of inconsistent state programs. New York should prove to be an important test market for the feasibility of a uniform national bill, and for this reason, many will await the results of the New York experience.*

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131. See *supra* note 111 (industry lobbyists were successful in seeking amendment to increase handling fees).

132. The original New York bill called for a commission to be convened in 1985 and to report its findings by January 1, 1987. Returnable Container Act, ch. 200, sec. 3-10, 1982 N.Y. Laws 618-19. The 1983 amendments call for a commission to be named by July 1, 1983, and to report by December 31, 1984. Returnable Beverage Containers (Bottle Law), ch. 149, § 27-1014(3), 1983 N.Y. Laws 348.

133. The Massachusetts victory in the November, 1982 election is an important new impetus to national legislation. According to the director of Massachusetts Public Interest Research Group, a defeat would have signaled a weakness in the environmental movement as a popular cause by being "devastating in its impact on citizen activism." See IN THESE TIMES, *supra* note 70.

134. According to the Executive Director of the New York Environmental Planning Lobby, a group which was instrumental in the passage of New York's bottle bill, regulation of beer and soft drink containers is just the first step. The organization will now turn its attention to passing an Assembly bill which would require a 25 cent deposit on all alcoholic beverage bottles other than malt liquor. The bill, if implemented, would operate in much the same way as the state's Beverage Container Act. Such a law is not likely to be passed for about three years, however, when it is thought that New Yorkers will be comfortable with current container regulation. Telephone interview, *supra* note 24.

135. In California, environmental lobbyists are re-grouping to have a bottle bill on the ballot in the November, 1986 elections if they have not persuaded the California legislature to pass one before then.

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APPENDIX

COMPARISON OF BOTTLE BILLS IN NINE STATES

* √ = yes

STATE (in order of implementation)	AMOUNT OF DEPOSIT	HANDLING FEE	ADMINISTERING AGENCY	STATE NAME REQUIRED*
OREGON effective 1972	5 cents minimum; 2 cents for certified containers	—	Liquor Control Commission	—
VERMONT effective 1973	5 cents minimum	greater of 2 cents or 20% of deposit	Department of Environmental Conservation	√
MICHIGAN effective 1978	10 cents minimum; 5 cents for certified containers	—	Liquor Control Commission	√
MAINE effective 1978	5 cents minimum	2 cents	Department of Agriculture	—
IOWA effective 1979	5 cents minimum	1 cent	Department of Water, Air and Waste Management	—
CONNECTICUT effective 1980	5 cents minimum	1 cent	Department of Environmental Protection	√
DELAWARE effective 1981	5 cents minimum	20% of deposit	Department of Natural Resources and Environmental Control	√
MASSACHUSETTS effective Jan. 1983	5 cents minimum for less than 32 oz.; 10 cents minimum for 32 oz. or more	1 cent	Department of Environmental Affairs	—
NEW YORK effective Sept. 1983	5 cents minimum	1.5 cents	Department of Environmental Conservation	√

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BANS PULL-TOPS*	BANS PLASTIC LOOPS*	PENALTIES	SPECIAL FEATURES
✓	✓	suspension or revocation of license; maximum of \$500 per day fine	limits returnables to 96 per person per day
✓	✓	maximum fine of \$1,000 for each violation	— educational program — bans sale of non- refillable glass containers
—	—	fines of \$100- \$1,000 per each day of violation plus costs of prosecution	not required to accept returnables for a refund in excess of \$25 per day
✓	✓	maximum fine of \$100	limits returnables to 240 per person per day
✓	—	simple misdemeanor	— deposit required on alcoholic liquor bottles — \$100,000 paid annually for treatment of alcoholics
✓	—	1st offense: \$50-\$100 2nd offense: \$100-\$200 3rd offense: \$250-\$500	exempts containers sold on interstate passenger carriers
✓	✓	fine of \$250-\$1000, injunction or TRO if likelihood of recurrence, monetary damages for continuing violations	— limits returnables to 119 per person per week — educational program — persons under 20 cannot redeem beer or other alcoholic beverage containers
—	✓	maximum fine of \$1,000	exempts containers sold on interstate passenger carriers
✓	✓	maximum fine of \$500 plus additional fine of \$500 per each day violation continues	requires temporary state commission to study effects